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ALEXANDER L. STEVAS,
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83-1044

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT JOHN WINICKI,

Petitioner,

v.

ROBERT A. MALLARD, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA FIRST DISTRICT COURT OF APPEAL

ROBERT J. WINICKI
MAHONEY HADLOW & ADAMS
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QUESTIONS PRESENTED

1. Does 42 U.S.C. § 1988 apply to 42 U.S.C. § 1983 claims, filed in state court, alleging violations of federal constitutional rights?

2. Does 42 U.S.C. § 1988 require a prevailing party to benefit the public generally, as a precondition to an award of attorney's fees?

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3. Lynwood Roberts, as Tax Collector of Duval County, Florida.

4. Randy Miller, Executive Director of the Department of Revenue of the State of Florida.

5. Jim Smith, Attorney General of the State of Florida.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT JOHN WINICKI,

Petitioner,

v.

ROBERT A. MALLARD, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA FIRST DISTRICT COURT OF APPEAL

Robert John Winicki hereby petitions for a writ of certiorari to review the judgment of the court of appeal in this case.

OPINIONS BELOW

The opinion of the Florida First District Court of Appeal denying rehearing on the attorney's fee issue is reported at ___ So.2d ___, 8 Fla. L. W. 8791. See App. A. The original opinion of the Florida First District Court of Appeal affirming denial of fees without opinion is

unreported. See App. B. The opinion of the trial court is unreported. See App. C. The trial court's opinion on the merits of petitioner's constitutional claims is unreported. See App. D. The affirmance of the Florida First District Court of Appeal is reported at 436 So.2d 926. See App. E. An interlocutory opinion of the Florida First District Court of Appeal reversing the trial court's order staying petitioner's constitutional claims is reported at 417 So.2d 742.

JURISDICTION

The opinion of the Florida First District Court of Appeal denying rehearing of its affirmance without opinion (entered on September 16, 1983) of the trial court's denial of fees was entered on November 21, 1983. The Florida Supreme Court does not have jurisdiction to review decisions of the Florida district courts of appeal involving the construction of a federal statute. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

This petition involves the application of the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988,

which provides in pertinent part that in "any action or proceeding to enforce a provision of section . . . 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs."

STATEMENT OF THE CASE

In the summer of 1981, petitioner returned to Florida after completing a two year judicial clerkship with Chief Judge Floyd R. Gibson of the United States Court of Appeals for the Eighth Circuit. In the fall of 1981, petitioner purchased a home in Jacksonville, Florida. At that time, petitioner became aware that during his absence from Florida, the Florida Legislature had enacted legislation increasing the homestead ad valorem real property tax exemption to $25,000. The increased exemption, worth about $400 per year, however, was restricted to those individuals who have been "a resident of this state for the 5 consecutive years prior to claiming the exemption." Fla. Stat. § 196.031(3)(d)-(e) (1981). Petitioner believed this durational residency requirement violated his right to travel and equal protection under the United States

Constitution.

One month after this Court decided Fair Assessment In Real Estate Association v. McNary, 454 U.S. 100 (1981), petitioner filed a 42 U.S.C. § 1983 remedy action in Florida state court. At the time petitioner filed suit, he was aware of one other challenge to the durational residency requirement. Mr. Osterndorf, an attorney, of Daytona Beach had been unsuccessful in his attempt to obtain jurisdiction in federal district court because of the Tax Injunction Act of 1937, 28 U.S.C. § 1341, and had also been unsuccessful on the merits of his claim in the Florida state trial court. See Osterndorf v. Turner, 505 F. Supp. 175 (M.D. Fla. 1981).

The respondents were initially successful in obtaining a stay of petitioner's claims pending a final resolution of Mr. Osterndorf's appeals, through and including this Court. The Florida First District Court of Appeal reversed the trial court on the grounds that the stay denied due process of law. Winicki v. Mallard, 417 So.2d 742 (Fla. App. Ct. 1982).

After remand on the merits of petitioner's constitutional claims, on September 29, 1982, the Florida trial court entered an injunctive and declaratory order

finding the durational residency requirement in violation of the right to travel and equal protection under the United States Constitution. See App. D. This was the first time the statute had been declared unconstitutional. During its first two years of operation, Florida had collected over two hundred million dollars in excess taxes.

In the interim, Mr. Osterndorf was unsuccessful in his appeal before the Florida Fifth District Court of Appeal. Osterndorf v. Turner, 411 So.2d 330 (Fla. App. Ct. 1982). The Florida Supreme Court, however, had accepted certiorari and petitioner filed an amicus brief, thereby joining forces with Mr. Osterndorf. On December 16, 1982, the Florida Supreme Court held that the statute violated equal protection under the Florida Constitution. Osterndorf v. Turner, 426 So.2d 540 (Fla. 1983). The Florida Supreme Court did not address the federal issues, although the analysis was based primarily on federal constitutional case law. See id. at 544.

In Osterndorf, the Florida Supreme Court ruled on a prospective basis, allowing only Mr. Osterndorf, petitioner, and another attorney who had filed suit to

receive refunds. Id. at 545. If petitioner had not filed suit, he would have been denied a damage remedy. Also, the court allowed the illegal taxes to be collected for the 1982 tax year, despite the fact that both petitioners' and Mr. Osterndorf's cases had been decided before any taxes were due for 1982. This allowed Florida to collect another hundred million dollars in illegal taxes.

After the Florida Supreme Court ruled, respondents appealed the Florida trial court's order in petitioner's case, which held the statute unconstitutional on federal grounds. On May 20, 1983, the Florida First District Court of Appeal affirmed on the authority of Osterndorf, or Florida constitutional grounds, and did not address the federal issues. Mallard v. Winicki, 436 So.2d 926 (Fla. App. Ct. 1983).

Four days later, the Florida trial court denied petitioner's request for fees on the basis of Cofield v. City of Atlanta, 648 F.2d 986 (5th Cir. 1981). See App. C. Petitioner appealed this order to the Florida First District Court of Appeal on the basis that Cofield did not address the issue of whether 42 U.S.C. § 1988 provides for

an award of fees to a prevailing party who is a licensed attorney who represents himself. The United States Court of Appeals for the Fifth Circuit had expressly held this to be the case in Cazalas v. United States Department of Justice, 709 F.2d 1051, 1055 n.8 (5th Cir. 1983) in an opinion rendered after the Florida trial court entered its order denying petitioner fees.

The Florida First District Court of Appeal, without oral argument, affirmed without opinion. See App. B. Petitioner moved for rehearing, this time attaching a copy of Cazalas. On November 21, 1983, the Florida appellate court in a two to one decision denied rehearing. The majority wrote an opinion affirming the trial court on other grounds.

The majority found: (1) that Florida state law, not 42 U.S.C. § 1988, applied to the fee issue because it had affirmed the merits on state grounds; (2) in dicta, that even if it were to apply federal law, it believed that 42 U.S.C. § 1988 required a prevailing party to benefit the public generally as a precondition to an award of fees; and (3) that petitioner was free to litigate his claim for

fees under 42 U.S.C. § 1988 in federal district court.

Chief Judge Ervin of the Florida First District Court of Appeal dissented on the grounds that since petitioner had prevailed on the issue on appeal, the case should be remanded to the trial court to allow petitioner to present argument and evidence on the issues raised by the majority.

Petitioner never was allowed to present any argument or evidence, either before the trial court or the appellate court on the factual and legal issues decided by the majority.

The specific federal questions presented in this petition were never contested by the respondents in opposition to petitioner's claim for fees under 42 U.S.C. § 1988, either before the trial court or the appellate court. The Florida First District Court of Appeal raised these specific issues on their own and did not afford either the petitioner or the respondents an opportunity to argue the issues. Petitioner, however, since the day of filing his complaint has alleged that 42 U.S.C. § 1988 governs the award of attorney's fees both before the state

trial and state appellate courts.

REASONS FOR ALLOWING THE WRIT

The Florida First District Court of Appeal's ruling on the issues presented are in direct conflict with this Court's holdings in Maher v. Gagne, 448 U.S. 122 (1980), Maine v. Thiboutot, 448 U.S. 1 (1980) and Hensley v. Eckerhart, ___ U.S. ___, 76 L.Ed 2d 40 (1983). This is why the respondents never even raised the issues of: (1) Does 42 U.S.C. § 1988 apply to 42 U.S.C. § 1983 claims, filed in state court, alleging violations of federal constitutional rights; and (2) Does 42 U.S.C. § 1988 require a prevailing party to benefit the public generally, as a precondition to an award of attorney's fees.

Justice Rehnquist in the Court's opinion in Fair Assessment in Real Estate Association v. McNary, 454 U.S. 100 (1981) held that principles of comity required federal district courts to refrain from adjudicating 42 U.S.C. § 1983 federal constitutional claims involving state taxes. Petitioner, as well as Mr. Osterndorf, was forced to file suit in Florida state court to obtain redress of the violation of his federal constitutional rights. As a

result thereof, he was also forced to litigate his federal statutory right to attorney's fees in state court.

This Court's decision in Fair Assessment imposed a special burden on the Court to exercise its discretionary certiorari jurisdiction to correct fundamental errors by a state court in the construction of federal statutes. This Court must be open for taxpayers seeking protection of their federal rights by state remedies to "ultimately seek review of the state decisions in this Court." Id., 454 U.S. at 116.

The first issue concerning whether 42 U.S.C. § 1988 applies to 42 U.S.C. § 1983 claims filed in state court has been conclusively answered in the affirmative in Maine v. Thiboutot, 448 U.S. 1, 10 (1980). In addition, both Maher v. Gagne, 448 U.S. 122, 132 (1980) and more recently Hensley v. Eckerhart, ___ U.S. ___, ___, 76 L.Ed 2d 40, 50-51 (1983), expressly stated that 42 U.S.C. § 1988 "was not limited to awarding fees only when a constitutional or civil rights claim is actually decided." The fact that the Florida First District Court of Appeal affirmed petitioner's federal claims on state constitutional

grounds without addressing the trial court's ruling on the federal constitutional claims is irrelevant.

The second issue concerning whether 42 U.S.C. § 1988 requires a prevailing party to benefit the public generally, as a precondition to an award of fees was conclusively answered by this Court in the negative in Hensley v. Eckerhart, __ U.S. __, __, 76 L.Ed 2d 40, 48 & ns. 3-4 wherein the Court adopted the Fifth Circuit's Johnson factors. No such requirement is present, and even if one were, petitioner, should have been afforded an opportunity to present evidence and argument on this issue.

Quite frankly, the Florida First District Court of Appeal's conclusion on this factual issue is puzzling, if not xenophobic. Any new resident of Florida has been greatly benefited by petitioner's actions. Mr. Osterndorf, Justice Overton of the Florida Supreme Court and even the respondents' attorneys could be called to testify concerning petitioner's role in overturning the durational residency requirement.

CONCLUSION

Certiorari should be granted and the order of the Florida First District Court of Appeal should be summarily reversed and remanded for determination of the proper amount of fees.

Respectfully submitted,

MAHONEY HADLOW & ADAMS

By Robert J. Winicki

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing have been furnished to BARBARA S. HARMON, ESQUIRE, The Capitol, Room LL04, Tallahassee, Florida 32304 and LINDA L. BRYAN, ESQUIRE, 1300 City Hall, Jacksonville, Florida 32202, by U. S. Mail this 30th day of November, 1983.

Robert J. Winicki
Attorney

APPENDIX

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

ROBERT JOHN WINICKI,)

Appellant,)

CASE NO. AT-178

vs.)

ROBERT A. MALLARD, et al.,)

Appellees.)

Opinion filed November 21, 1983.

An Appeal from the Circuit Court for Duval County. Louis C. Corbin, Judge.

Robert John Winicki, Pro Se, Jacksonville, for Appellant.

Barbara Staros Harmon, Assistant Attorney General, Tallahassee, for Appellees Randy Miller and Jim Smith, Attorney General.

Linda Logan Bryan, Assistant General Counsel, Jacksonville, for Appellees Robert A. Mallard and Lynwood Roberts.

ON HEARING

THOMPSON, Judge.

Winicki, an attorney litigant proceeding pro se, filed a complaint in circuit court requesting that the five-year consecutive residency requirement of §§ 196.031(3)(d), .131(3)(e), Fla. Stat. be declared violative of the United States Constitution. He alleged that the Florida court had jurisdiction in matters relating to property transactions, that his suit was a civil action for monetary and injunctive relief pursuant to 42 U.S.C. § 1983 and that he was entitled to costs and attorney's fees pursuant to 42 U.S.C. § 1988. The circuit court ruled that §§ 196.031(3)(d), .031(3)(e) violated the right to equal protection under the United States Constitution, and the defendants appealed to this court. This court affirmed the circuit court for the reason enunciated in and on the authority of Osterndorf v. Turner, 426 So.2d 539 (Fla. 1982). In Osterndorf the Supreme Court found, based solely on the equal protection clause of the Florida Constitution,

that the durational residency requirement of §§ 196.031(3)(d), .031(3)(e) was unconstitutional. The lower court denied Winicki's motion for attorney fees, citing Cofield v. City of Atlanta, 648 F.2d 986 (5th Cir. 1981), and Winicki appealed this denial. The denial of attorney fees was per curiam affirmed without written opinion by this court. Winicki seeks rehearing, which for the reasons below we deny.

Winicki contends that the sole issue in this case is whether 42 U.S.C. § 1988 provides for an award of attorney fees to a prevailing party who is a licensed attorney representing himself. Winicki argues that it is clear from Cazalas v. United States Department of Justice, 709 F.2d 1051 (5th Cir. 1983) that Cofield did not prohibit the award of attorney fees to a licensed attorney representing himself but expressly left this issue open. Although Cofield, which involved a non-attorney pro se litigant and left open the question of whether attorney fees should be awarded under the Civil Rights Attorney's Fees Awards Act to an attorney litigant proceeding pro se, does not support the trial court's denial of Winicki's

motion for attorney fees, we conclude the trial court properly denied the motion for attorney fees. See generally Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1980).

Under 42 U.S.C. § 1988 the court, in its discretion, may allow the prevailing party a reasonable attorney's fee. In cases such as Cazalas, dealing with entitlement to a fee award in Freedom of Information Act (5 U.S.C. § 552) cases, two of the factors considered by the courts is whether the pro se attorney litigant has performed a service to the public generally or whether it is a personal benefit to the pro se litigant. Although this clearly was not a Freedom of Information Act case, it seems that the test of whether the pro se attorney litigant has performed a service which would benefit the public generally or whether he has merely performed a service which would benefit himself personally would be important in a case such as this case. Although Winicki modestly claims credit for having the courts declare the act unconstitutional, the fact remains that there were at least two other cases, both brought by attorney litigants, proceeding pro se,

involving exactly the same question already before Florida appellate courts when Winicki filed his complaint. See Maguire v. Schultz, 426 So.2d 1303 (Fla. 2d DCA 1983); Osterndorf v. Turner, 411 So.2d 330 (Fla. 5th DCA 1982). Additionally, Osterndorf was on certiorari to the Supreme Court of Florida before the circuit court opinion in this case was obtained. It was obvious that Osterndorf would decide the precise constitutional question raised by Winicki long before a final decision could be reached in his case. The only benefit that could possibly be derived from pursuing his case would be a personal benefit to protect his own interest. Accordingly, even if the question should be decided in accordance with federal cases interpreting federal law, the attorney's fees were properly denied because of the lack of public benefit derived from Winicki's actions. Otherwise, all of the attorneys in the state with standing could file suits pro se to declare a state law unconstitutional and, if one is successful, all could collect substantial fees.

In addition, the plaintiff elected to file this action in the state court alleging violation of the federal law

and federal constitution. The correctness of the lower court's finding that §§ 196.031(3)(d), .031(3)(e) was unconstitutional was expressly upheld by this court on the basis of Osterndorf, which was based solely on the Florida Constitution, not on the United States Constitution or 42 U.S.C. § 1983. Under these circumstances, Florida law, not federal law should apply and there is no basis for the award of an attorney's fee under Florida law in this case.

Winicki made it clear in his motion for attorney's fees that he was exposing his federal statutory right to attorney's fees to the circuit court only because of the possible application of 28 U.S.C. § 1341, or the doctrines of abstention and that he intended, should the state court hold against him, to return to the federal district court for disposition of his federal claims. If he has a claim for attorney's fees in federal court, which it does not appear he would even under federal law, then he is free to pursue it.

Rehearing denied.

WIGGINTON, J., CONCURS. ERVIN, C.J., DISSENTS.

ERVIN, C.J., Dissenting.

I respectfully dissent. The trial court, adopting the reasoning of Cofield v. City of Atlanta, 648 F.2d 986 (5th Cir. 1981), similarly denied Winicki's motion for attorney's fees without reaching the merits of that motion. On further reflection, I am unable to agree with the majority's affirmance of the denial and would, instead, reverse and remand the case to the lower court to decide on the merits whether the motion should be granted.

Cofield reflects the general view that a pro se, non-attorney litigant may not recover attorney's fees under the various federal statutes providing therefor. For example, attorney's fees have been denied such litigants when sought in civil rights cases pursuant to 42 U.S.C. § 1988, see Cofield; Pitts v. Vaughn, 679 F.2d 311 (3rd Cir. 1982); Owens-El v. Robinson, 694 F.2d 941 (3rd Cir. 1982); as well as in suits brought under the Freedom of Information act (FOIA), see Clarkson v. Internal Revenue Service, 678 F.2d 1368 (11th Cir. 1982), and under the federal Privacy Act, see Barrett v. Bureau of Customs, 651 F.2d 1087 (5th Cir. 1981).

A different result has been reached, however, in cases wherein the litigant is an attorney appearing in propria persona. The various state courts that have sustained the propriety of awarding attorney's fees to a pro se attorney litigant are divided on the issue, see Annotation 78 A.L.R. 3rd 1119 (1977), but the weight of authority appears to support the award of such fees if permitted by statutory authority. Following what it terms the "narrow majority of jurisdictions", Florida's Third District Court of Appeal upheld an award of attorney's fees to an attorney appearing on his own behalf in an action seeking damages for securities violations under Chapter 517, Florida Statutes. Quick & Reilly, Inc. v. Perlin, 411 So.2d 978, 980 (Fla. 3rd DCA 1982). Federal courts, faced with the same issue, have similarly awarded fees to pro se attorney litigants if allowed by federal statutes, despite the courts' denial of such fees to non-attorney litigants. See Cuneo v. Rumsfeld, 553 F.2d 1360 (D.C. Cir. 1977) (pro se attorney litigant in FOIA suit entitled to fees); Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980) (pro se attorney defendants entitled to fees under § 1988 as prevailing

parties in frivolous and vexatious lawsuit). Indeed, several courts, in denying fee requests from non-attorney pro se litigants, have suggested a different result would be required if the litigant had been an attorney. See Pitts, 679 F.2d at 313; Barrett, 651 F.2d at 1089; Owens-El, 694 F.2d at 943; Clarkson, 678 F.2d at 1371.

As the majority acknowledges, the above distinction between attorney and non-attorney pro se litigants has likewise been recognized by the Fifth Circuit Court of Appeals. Cofield, upon which the trial court relied, while observing that the successful pro se plaintiff was not an attorney, denied the request for fees, finding that the congressional purpose in enacting section 1988 was "to enable and encourage a wronged person to retain a lawyer." 648 F.2d at 988. In the case at bar, we previously affirmed without opinion the lower court's order denying attorney's fees, which was in turn based upon the analysis stated in Cofield. The lower court's order never reached the merits of the question of Winicki's entitlement to such fees.

Appellant, on motion for rehearing, has brought to our attention the case of Cazalas v. United States

Department of Justice, 709 F.2d 1051 (5th Cir. 1983), which is a more recent refinement of the Cofield rule, wherein the court held that an award of attorney's fees may appropriately be granted to an attorney acting in propria persona. The opinion distinguished between prior decisions in which the question of the propriety of awarding fees to pro se attorney litigants had not been decided, expressly noting that Cofield had "left open the same question under the Civil Rights Attorney's Fees Awards Act." 709 F.2d at 1055 n.8.

Despite the Fifth Circuit's unambiguous acknowledgment that a distinction should be drawn between attorney and non-attorney pro se litigants when assessing the propriety of attorney's fee awards, and that court's specific statement that Cofield did not decide the issue as it relates to the propriety of such awards under section 1988, the majority would not affirm the trial court's denial of fees by referring to Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979), evidently for the proposition that "[e]ven when based on erroneous reasoning, a conclusion or decision of a trial court will

generally be affirmed if the evidence of a trial court will generally be affirmed if the evidence or an alternative theory supports it." Id. at 1152. The majority itself then proceeds to advance such a theory by addressing the merits of Winicki's claim and thereupon concludes, on several grounds, that his claim is without merit.

The obvious distinction between Applegate, and the case at bar is that the trial court in Applegate, before which a non-jury trial was held, reached the merits of the dispute, albeit without benefit of a court reporter's presence. Because the appellant was unable to bring forward an adequate record to support its contention that reversible error had occurred, there was no recourse for an appellate court to do other than affirm the trial court's decision. In the case before us, however, there is nothing to suggest that the trial court considered or determined the merits of Winicki's claim. In my judgment it is therefore improper at this juncture for the majority to acknowledge that Cofield does not support the trial court's denial of fees, but then affirm on the merits of the claim, when the merits were never considered by the lower court

and therefore could not be considered as an alternative basis for its decision to deny his request for attorney's fees.[1]

I would therefore grant rehearing and reverse the trial court's denial of Winicki's motion for attorney's fees under section 1988, and remand for the purpose of allowing that court to exercise its discretion on the

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1 The majority relies on federal cases interpreting the Freedom of Information Act (specifically 5 U.S.C. § 552), requiring as a precondition to an award of fees that an attorney perform a service to the public generally. This requirement may not be applicable, however, to actions instituted under section 1988. Cofield itself questions the persuasiveness of opinions construing the Freedom of Information Act and those involving the civil rights statutes:

> For example, it seems to us that actions brought under the Freedom of Information Act are likely to be brought by pro se litigants; damages are generally not involved and the relief sought is simply the release of information. Furthermore, section 552(a)(4)(F) may suggest that an award of attorney's fees may be in part punitive, "a useful sanction for unfounded resistance to a disclosure request. . . ." Lovell v. Alderete, 630 F.2d at 437 (Thomas A. Clark, Circuit Judge, dissenting). There is no suggestion that an award of section 1988 attorney's fees should be in any way punitive.

648 F.2d at 988 n.4.

merits of the issue as to whether Winicki is entitled to recover a reasonable attorney's fee.

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

ROBERT JOHN WINICKI,

Appellant,

vs.

ROBERT A. MALLARD, et al.,

Appellees.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED.

CASE NO. AT-178

Opinion filed September 21, 1983.

An Appeal from the Circuit Court for Duval County. Louis C. Corbin, Judge.

Robert John Winicki, Pro Se, Jacksonville, for Appellant.

Barbara Staros Harmon, Assistant Attorney General, Tallahassee, for Appellees Randy Miller and Jim Smith, Attorney General.

Linda Logan Bryan, Assistant General Counsel, Jacksonville, for Appellees Robert A. Mallard and Lynwood Roberts.

PER CURIAM.

AFFIRMED.

ERVIN, C.J., THOMPSON and WIGGINTON, JJ., CONCUR.

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 83-35-CA

DIVISION: D

ROBERT JOHN WINICKI,

Plaintiff,

vs.

ROBERT A. MALLARD, et al.,

Defendants.

ORDER ON PLAINTIFF'S MOTION FOR ATTORNEY'S FEES

This cause came on to be heard on the Plaintiff's Motion for Attorney's Fees. The Plaintiff withdrew his request for 3½ hours of Mr. Mark Taylor, Esquire's time spent with the Plaintiff at the Plaintiff's deposition held in March, 1983. This Court adopts the reasoning of the Court in Cofield vs. City of Atlanta, 648 F.2d 986 (5th Cir. June 23, 1981). It is, therefore

ORDERED AND ADJUDGED:

The Plaintiff's Motion for Attorney's Fees is

hereby DENIED.

DONE AND ORDERED at Jacksonville, Duval County, Florida, this 24th day of May, 1983.

/s/ LOUIS C. CORBIN
CIRCUIT JUDGE

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IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

Case No. 82-35-CA

Division: D

ROBERT JOHN WINICKI,

Plaintiff,

vs.

ROBERT A. MALLARD, Property Appraiser of Duval County, Florida; LYNWOOD ROBERTS, as the Tax Collector of Duval County, Florida; and RANDY MILLER, as Executive Director, Department of Revenue of the State of Florida,

Defendants.

JIM SMITH, Attorney General of the State of Florida,

Intervenor-Defendant.

ORDER

This matter having come before this Court on plaintiff's and defendants' cross-motions for summary

judgment concerning the constitutionality of § 196.031(3)(d)-(e), Fla. Stat. (1981), it is hereby ORDERED and ADJUDGED:

1. In light of Zobel v. Williams, ___ U.S. ___, 72 L.Ed.2d 672 (1982), the consecutive five year durational residency requirement of Florida's enhanced homestead exemption for ad valorem taxes, § 196.031(3)(d)-(e), Fla. Stat. (1981), violates the right to travel and equal protection of the laws under the United States Constitution.

2. The defendants are permanently enjoined from requiring the plaintiff to be a resident of Florida for five consecutive years in order to be entitled to the enhanced homestead exemption.

3. The issue of whether the plaintiff is entitled to costs and attorney's fees will be decided at a hearing to be scheduled at a later date.

4. Defendants' motion for summary judgment is DENIED.

5. Plaintiff's motion for summary judgment is GRANTED.

DONE AND ORDERED this 29th day of September, 1982, in Chambers in Jacksonville, Florida.

/s/ LOUIS C. CORBIN
Louis C. Corbin
Circuit Judge

Copies furnished to:

Robert J. Winicki
Mark C. Taylor
Linda Logan Bryan
Barbara Staros Harmon

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

ROBERT A. MALLARD, Property Appraiser of Duval County, Florida; LYNWOOD ROBERTS, as the Tax Collector of Duval County, Florida; and RANDY MILLER, as Executive Director of the Department of Revenue, State of Florida,

Appellants,

vs.

ROBERT JOHN WINICKI,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED.

CASE NO.: AP-133

Opinion filed May 20, 1983.

An Appeal from the Circuit Court for Duval County. Louis C. Corbin, Judge.

Barbara Staros Harmon, Assistant Attorney General, Tallahassee, for Appellant Randy Miller and Intervenor Jim Smith, Attorney General.

Linda Logan Bryan, Assistant General Counsel, Jacksonville, for Appellants Robert A. Mallard and Lynwood Roberts.

Robert John Winicki & Mark C. Taylor, Jacksonville, for Appellee.

PER CURIAM.

Affirmed on the authority of and for the reasons enunciated in Osterndorf v. Turner, 426 So.2d 539 (Fla. 1983).

ERVIN, THOMPSON, and WIGGINTON, JJ., CONCUR.

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NO. 83-1044
IN THE
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OCTOBER TERM, 1983

ROBERT JOHN WINICKI,
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ROBERT A. MALLARD, et al.,
Respondents.

On Writ of Certiorari to the
Florida First District Court of
Appeal

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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On Writ of Certiorari to the Florida First District Court of Appeal

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUPPLEMENTAL STATEMENT OF THE CASE

The Respondents, Mallard, Roberts, Miller and Smith, supplement the peti-

tioner's Statement of the Case with the following facts in order to clarify the history of the litigation now before this Court:

1. At the time Petitioner Winicki filed the instant action in state court, two separate challenges to the durational residency requirement of which Winicki complained were pending in state courts, namely Osterndorf v. Turner, Case No. 81-864, Fifth District Court of Appeal, and Maguire v. Schultz, Case No. 81-2447, Second District Court of Appeal.

2. Osterndorf v. Turner, 426 So.2d 539 (Fla. 1982), on which the First District Court of Appeal relied in affirming the trial court, held that the durational residency requirement violated Article I, Section 2 of the Florida Constitution (equal protection clause).

3. On the appeal of the constitutionality of the residency requirement, Respondents conceded that Osterndorf was dispositive of the issue; therefore, the only substantive issue argued by either side in the appellate court was the ground on which the invalidity of the statute should be upheld. (AR. 1-12)[1]

4. The state trial court's Order on the attorneys' fee issue "adopts the reasoning of the Court in Cofield v. City of Atlanta, 648 F.2d 986 (5th Cir. June 23, 1981)," (A.3) (emphasis added), not the holding of the Cofield court.

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[1] The symbol "AR is to the Appendix of Respondent, and the symbol "A" is to the Appendix of Petitioner.

5. On rehearing of the fee issue, the First District Court of Appeal held that Florida law, not federal law, applied because the correctness of the trial court's holding invalidating the residency requirement was expressly upheld solely on the basis of the Florida Constitution. (A.1, p. 6)

6. On rehearing of the fee issue, in dicta the First District Court of Appeal consults the pro se attorney litigant cases arising under the Freedom of Information Act ("FOIA"), then states that it seems that the performance of a service beneficial to the public generally "would be important" in a §1988 case. (A.1, p. 4).

SUMMARY OF ARGUMENT

1. Petitioner fails to establish that the state court decided a federal

question in a way in conflict with an applicable decision of this Court. Therefore the Petition for Writ of Certiorari should be denied. 28 U.S.C. §1257(3); Supreme Court Rule 17.1(c).

2. The state appellate court decision indicates clearly and expressly that it is based on a bona fide separate, adequate and independent state ground. Therefore, the Petition for Writ of Certiorari should be denied.

ARGUMENT

The Petition for Writ of Certiorari should be denied. Petitioner seeks to invoke the discretionary jurisdiction of this Court pursuant to 28 U.S.C. §1257(3), (Brief of Petitioner at 4), by contending that the First District Court of Appeal, the state court of last resort,

decided the federal questions he presents in a way in "direct conflict" with this Court's holdings in Maher v. Gagne, 448 U.S. 122 (1980); Maine v. Thiboutot, 448 U.S. 1 (1980) and Hensley v. Eckerhart, ___ U.S. ___; 76 L.Ed.2d 40 (1983), (Brief of Petitioner at 11), as is prescribed in Supreme Court Rule 17.1(c). The conflicts presented by Petitioner are contrived. The state court has not decided a federal question in a way in conflict with any applicable decisions of this Court. Furthermore, the state court decision indicates clearly and expressly that it is based on a bona fide separate, adequate and independent state ground. Therefore, Respondents respectfully submit that this Court should not undertake the certiorari review of the state court decision.

I.

In the first question presented, Petitioner asks whether 42 U.S.C. §1988 applies to 42 U.S.C. §1983 claims, filed in state court, alleging violation of federal constitutional rights. Then, he asserts that this question "has been conclusively answered in the affirmative in Maine v. Thiboutot, 448 U.S. 1, 10 (1980)." (Brief of Petitioner at 12.) The conclusive answer provided by Maine v. Thiboutot pertinent to this question is that there is no merit to the contention that §1988 does not apply to §1983 claims in state courts. 448 U.S. at 10. The First District Court of Appeal does not hold that §1988 does not apply to §1983 claims in state courts. It holds that §1988 is not applicable in this action because it invalidated the residency

requirement on state constitutional grounds. Applying Florida law on attorneys' fees, the First District Court of Appeal finds that there is no basis for award of attorneys' fees in this case. (A.1, p.6) There is no conflict between the First District Court of Appeal's holding based on state grounds and Maine v. Thiboutot. The state court's holding constitutes a bona fide separate, adequate and independent state ground precluding this Court's acceptance of jurisdiction. Michigan v. David Kerk Long, ___ U.S.____, 51 U.S.L.W. 5231, 5234 (July 6, 1983).

Moreover, Petitioner claims that Maher, 448 U.S. at 132, "expressly states that 42 U.S.C. §1988 'was not limited to awarding fees only when a constitutional or civil rights claim is actually decided.'" (Brief of

Petitioner at 12). Winicki implies that Hensley, 76 L.Ed.2d at 50-51 stands for the same proposition. (Brief of Petitioner at 12). Therefore, Winicki argues that the Florida appellate court's affirmance of his federal claims on state constitutional grounds is irrelevant to the determination of his entitlement to fees under §1988 in the instant case (Brief of Petitioner at 12-13), apparently suggesting another conflict between the holding of the state appellate court and the decisions of this Court. No such conflict exists.

The passage Petitioner quotes from Maher, is taken out of context. This Court considered a petitioner's argument that a federal court is barred by the Eleventh Amendment from awarding attorneys' fees under §1988 against a

state in a case involving a purely federal statutory, non-civil rights claim. 448 U.S. at 130-31. This Court did not have to reach the question presented by the petitioner, id. at 131; however, in dicta it opined that the Eleventh Amendment did not bar the award in the Maher case because "clearly Congress was not limited to awarding fees only when a constitutional or civil rights claim is actually decided." Id. at 132. Maher considered the effect of a federal statutory, non-civil rights claim brought pursuant to §1983 on the award of fees under §1988. Maher did not consider whether it is proper for a state court to decline to award attorneys' fees under §1988 when a state statute is invalidated on state constitutional grounds; therefore, no jurisdictional conflict is presented.

Finally, in Hensley, the issue before this Court was the proper methodology for determining the amount of an attorneys' fee award under §1988 when a federal plaintiff succeeded on only five out of six of his federal constitutional challenges to the manner of treatment and placement of mental patients at a state hospital. 76 L.Ed.2d at 46-51. This Court established a test based on the results obtained. Id. at 50-51. In Hensley, this Court clearly did not address the same issue before the state court. There is no conflict between the state court and the decision of this Court.

II.

In the second question presented, Petitioner asks whether 42 U.S.C. §1988 requires a prevailing party to benefit the

public generally, as a precondition to an award of attorneys' fees. (Brief of Petitioner at 13). He concludes that in Hensley vs. Eckerhart, 76 L.Ed.2d at 48 & ns. 3-4, this Court's adoption of the Fifth Circuit's Johnson factors conclusively demonstrates that no such threshold requirement or precondition exists. (Brief of Petitioner at 13). Furthermore, he states that the state appellate court's holding is that benefiting the public generally is a precondition to an award of fees under §1988. This, he concludes, establishes the conflict jurisdiction of this Court. (Brief of Petitioner at 9 and 13).

To begin with, this Court in Hensley cites the twelve Johnson factors as properly considered when determining the amount of a fee award. 76 L.Ed.2d

at 48 & ns. 3 - 4. The threshold determination of whether a plaintiff had "prevailed", namely whether he has met the "preconditions" for an award of fees, was not the issue before this Court in Hensley. Id. at 46.

Equally significant is the fact that the First District Court of Appeal did not hold that §1988 requires a pro se litigant attorney to benefit the public generally as a precondition to an award of fees. In its discussion of the federal case law on the award of fees to pro se litigant attorneys, the state appellate court concludes that such an award of fees under §1988 is an open and unresolved issue in the federal courts (A.1, p. 3 and 10); therefore, the state court looks to the limited number of FOIA cases involving the

award of fees to pro se litigant lawyers for guidance. The court states that this is clearly not an FOIA case, but reasons that the determination of whether the pro se attorney litigant benefited the public generally or simply achieved a personal benefit "would be important in a case such as this case." (A.1, p. 4); see also Mid-Hudson Legal Services, Inc. v. G & U, Inc., 578 F.2d 34, 36-37(2d Cir. 1978). Then, the state court opines that Winicki derived only personal benefit so that even if federal law was applicable, fees were properly denied. It does not hold that public benefit is a precondition to an award of fees pursuant to §1988, and Hensley does not hold that public benefit is not a precondition to an award of fees under §1988. Therefore, there is no conflict on which to invoke the jurisdiction of this Court.

Assuming arguendo that the state

court dicta somehow conflicts with a decision of this Court on the public benefit issue, this Court should, nevertheless, deny the Petition for Writ of Certiorari because the state court decision indicates clearly and expressly that it is based on a bona fide separate, adequate and independent state ground. (A.1, p.6); Michigan v. David Kerk Long, 51 U.S.L.W. 5231, 5234. [2]

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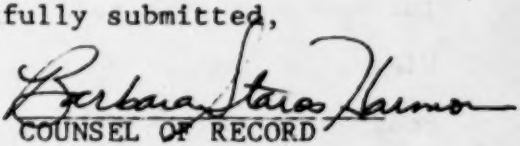
[2] The Florida Supreme Court in Osterndorf on which the First District Court of Appeal relied to invalidate the durational residency requirement (A. 5) stated:

> In the instant case, we choose to hold section 196.031(3)(e) unconstitutional under the equal protection clause of article I, section 2, of the Florida Constitution, and therefore do not address its constitutionality under the equal protection clause of the fourteenth amendment and the privileges and immunities clause of the United States Constitution.
> 426 So.2d at 544.

CONCLUSION

The Petition for a writ of certiorari to the Florida First District Court of Appeal should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, have been furnished by U.S. Mail to Robert J. Winicki, Esquire, Mahoney, Hadlow & Adams, Post Office Box 4099, 100 Laura Street, Jacksonville, Florida 32201, this 27th day of January, 1984.

Barbara Staros Harmon
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APPENDIX OF RESPONDENTS

IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

ROBERT A. MALLARD, et al.,

Appellants,

vs. CASE NO. AP-133

ROBERT JOHN WINICKI,

Appellee.
_____/

APPELLANTS' INITIAL BRIEF

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ARGUMENT

As stated in the Statement of the Facts and the Case, the Florida Supreme Court held the durational residency requirements of §196.031(3)(d) and (e), Fla.Stat. to be unconstitutional as violative of the equal protection clause of the Florida Constitution. Osterndorf v. Turner, Case No. 61,948. The opinion of December 16, 1982 and the opinion on rehearing dated February 3, 1983 are attached in the appendix to this brief.

The Appellants cannot distinguish Osterndorf from the instant case and concede that it is dispositive of the issues in this appeal. However, the trial court below based its decision on federal constitutional grounds. It is not necessary for this Court to reach the federal issues since the Florida Supreme

Court disposed of all issues under the equal protection clause of Article I, section 2 of the Florida Constitution. This court is bound by the reasoning of the Florida Supreme Court rather than of the trial court in this matter. Langley v. New Deal Cab Co., 138 So.2d 789 (Fla. 1 DCA 1962); cert. den., 155 So.2d 550 (Fla. 1963).

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing Appellants' Initial Brief and Appendix has been furnished by U.S. Mail to Robert John Winicki, Post Office Box 4099, Jacksonville, Florida 32202, this 4th day of February, 1983.

/s/BARBARA STAROS HARMON
Barbara Staros Harmon
Assistant Attorney General

IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

ROBERT A. MALLARD, et al.,

Appellants,

vs. Case No. AP-133

ROBERT JOHN WINICKI,

Appellee.

APPELLEE'S INITIAL BRIEF

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ISSUE

There is no issue on appeal from the trial court's ruling. Appellants should have filed a notice of dismissal of their appeal pursuant to Florida Rule of Apellate Procedure 9.350(b). In light of appellants' failure to utilize the correct procedural device to terminate their appeal, this court should affirm per curiam, in order that the court's and appellee's time be not further wasted.

Respectfully submitted,

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I HEREBY CERTIFY that a copy of the foregoing has been furnished to BARBARA S. HARMON, ESQ., Department of Legal Affairs, The Capitol, Room LL04, Tallahassee, Florida 32304; and LINDA L. BRYAN, ESQ., Office of General Counsel, 1300 City Hall, Jacksonville, Florida 32202, by U.S. Mail this 24th day of February, 1983.

/s/ROBERT J. WINICKI
Attorney

IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

ROBERT A. MALLARD, et al.,

Appellants,

vs. CASE NO. AP-133

ROBERT JOHN WINICKI,

Appellee.
_____/

APPELLANTS' REPLY BRIEF

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ARGUMENT

Appellants disagree with Appellee Winicki's reference, in his statement of the case and facts of the Answer Brief, to this case as an appeal from a non-final judgment pursuant to Rule 9.130, Fla. R. App. P.

It is Appellant's position that this appeal was taken, pursuant to Rule 9.110, Fla. R. App. P., from the final summary judgment of the Circuit Court, in and for Duval County, Florida, dated September 29, 1982. Although the trial court reserved ruling on the separate issue of attorneys' fees sought by Mr. Winicki, the Order was final as to the merits of the case as it was an end to the judicial labor and cause concerning the constitutionality of §196.031(3)(d) and (e), F.S.

Further, Appellants disagree with Mr. Winicki's assertion that appellants should have filed a notice of dismissal of the appeal.

The Appellants used the correct procedural device by timely submitting their Initial Brief which respectfully pointed out to this Court that the Florida Supreme Court's decision in Osterndorf v. Turner, Case No. 61,948 (Fla. Dec. 16, 1982), modified on reh'g, (Feb. 3, 1983) is dispositive of the instant case.

As discussed in the Initial Brief, the trial court below based its decision on federal constitution grounds. The Florida Supreme Court disposed of all constitutional issues under the equal protection clause of Article I, section 2 of the Florida Constitution.

Dismissal of the appeal by the appellants or simple affirmance by this Court of the Trial Court would result in inconsistent adjudication of a matter already resolved by the highest court of the state. This Court's order must be in harmony with the Florida Supreme Court in Osterndorf, supra. Langley v. New Deal Cab Co., 138 So.2d 789 (Fla. 1 DCA 1962); cert. den., 155 So.2d 550 (Fla. 1963).

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing Appellants' Reply Brief has been furnished by U.S. Mail to Robert John Winicki, Post Office Box 4099, Jacksonville, Florida 32202, this 16th day of February, 1983.

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